SUPREME COURT, U. S.

FEB 19 1969

CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 949

KAISER INDUSTRIES CORPORATION,
VEREINIGTE OESTERREICHISCHE EISEN-UND
STAHLWERKE AKTIENGESELLSCHAFT, and
BRASSERT OXYGEN TECHNIK AG.,
Petitioners,

v.

McLOUTH STEEL CORPORATION,
Respondent.

BRIEF OPPOSING MOTION OF THE GOVERNMENT OF AUSTRIA FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*

WILLIAM B. CUDLIP
T. DONALD WADE
DICKINSON, WRIGHT, McKEAN & CUDLIP
800 First National Building
Detroit, Michigan 48226
Attorneys for Respondent.

JOHN VAUGHAN GRONER
RONALD F. BALL
DONALD E. DEGLING
FISH, RICHARDSON & NEAVE
277 Park Avenue
New York, N. Y. 10017
Of Counsel.

February 18, 1969

TABLE OF CONTENTS

	PAGE
1. The Motion is Without Valid Basis	2
2. The Brief Attached to the Motion Sets Forth No Valid Reason for the Grant of the Writ of Certiorari	4
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:

Gen. Electric Co. v. *Wabash Co.*, 304 U. S. 364 (1938)	6
Gill v. *Wells*, 22 Wall. 1 (1874)	7
Halliburton Co. v. *Walker*, 329 U. S. 1 (1946)	7
Northern Securities Co. v. *United States*, 191 U. S. 555 (1903)	2
United Carbon Co. v. *Binney Co.*, 317 U. S. 228 (1942)	6
Universal Oil Co. v. *Globe Co.*, 322 U. S. 471 (1944)	6

STATUTES AND RULES:

35 U. S. C. § 112 (1952 Ed.)	6
35 U. S. C. § 33 (1946 Ed.)	6
R. S. § 4888	6
U. S. Sup. Ct. Rule 42, 28 U. S. C. A.	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 949

KAISER INDUSTRIES CORPORATION,
VEREINIGTE OESTERREICHISCHE EISEN-UND
STAHLWERKE AKTIENGESELLSCHAFT, and
BRASSERT OXYGEN TECHNIK AG.,
Petitioners,

v.

McLOUTH STEEL CORPORATION,
Respondent.

BRIEF OPPOSING MOTION OF THE GOVERNMENT OF AUSTRIA FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*

The Government of Austria has moved for leave to file a brief, as *amicus curiae,* in support of the Petition for a Writ of Certiorari filed herein on January 16, 1969 by the Petitioners, Kaiser Industries Corporation, *et al.* The brief, itself, is attached to and follows the Motion.*

The Motion is without legal or factual basis or justification. The Brief is simply a restatement of the arguments made in the Petition.

---

* References here will be designated as in Respondent's Brief in Opposition (see Br. in Op. p. 2). Additionally, the Petition for the Writ of Certiorari will be referred to as "Pet. p. "; the Motion of the Government of Austria as "Mot. p. "; and the Brief attached to the Motion as "Mot. Br. p. ".

1. The Motion is Without Valid Basis.

The Motion does not comply with the provisions of this Court's Rule 42, and, particularly with the requirement that it "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties . . ." (Rule 42-3).

While the Motion does assert that the "interests" of Austria "cannot be adequately presented by the parties" (Mot. p. 3), it makes no attempt to support this statement —and it is self-evident (see paragraph (a), below) that had Austria, at any time in the last ten years, felt its "interests" were not "adequately presented", it could have taken the necessary corrective action. The situation here is not unlike that in *Northern Securities Co.* v. *United States,* 191 U. S. 555, 556 (1903), where leave to file a brief *amicus curiae* was denied.

Beyond this

(a) Austria, in no sense, is an *amicus curiae;* it is an interested party owning one of the Petitioners, Vereinigte Oesterreichische Eisen-Und Stahlwerke Aktiengesellschaft (VOEST) (Pet. p. 8; see also Mot. p. 2), which, in turn, owns all of the stock of a second Petitioner, Brassert Oxygen Technik AG. (BOT) (R. pp. 9381-9382). A stockholder does not qualify as an *amicus curiae.*

(b) The Motion says that Austria's participation is

> "appropriate because the decisions below give rise to domestic and foreign policy problems for Austria" (Mot. p. 2; see also p. 3).

The "domestic and foreign policy problems" of Austria have no proper place in this litigation, and the Motion, in attempting to inject such problems here, is an impertinent effort to interfere with the normal course of judicial proceedings in the United States.

(c) The Motion states that

> "Steelmakers of nations throughout the world have paid royalties for the use of the invention in question [assumedly that of the patent in suit] . . . Only in the United States has the basic patent for the revolutionary L-D steelmaking process even been challenged" (Mot. p. 3).

This unsupported statement is contrary to the facts.

First, "steelmakers of nations throughout the world" have taken licenses under the VOEST-BOT international pool of patents, but not under "the invention in question". In 1956 there were over 300 patents in this pool (Dx 15, p. 65) and at the end of 1961 over 700 patents and 299 applications in 38 countries (Dx 83A). But, in many of these countries there was no Suess patent (Px 342, par. H; Px 15B; Px 17B, Px 24B; Px 26B; Px 27B and D), and, in the countries where a Suess patent said to correspond to the patent in suit existed, not a single one was directed to the subject matter here involved (Dx 69).

Even more significantly, the record here does not show a case, in the United States or elsewhere, where a license was sought or granted under the patent in suit or under a process defined in the language of the specification or of the claims of the patent in suit.

Second, the patent in suit is *not* "the basic patent for the revolutionary L-D steelmaking process".* It was preceded by a host of patents relating to the basic oxygen steelmaking process**, including particularly Schwarz German No. 735,196 of 1943 (App. pp. 231a-235a), and Miles Belgian No. 468,316 of 1946 (App. pp. 236a-254a), both of which were owned by VOEST-BOT (App. pp. 13a-14a).

---

* It is assumed that the expression "L-D steelmaking process" refers to the process generally called the basic (as contradistinguished from acidic) oxygen steelmaking process (see Pet. p. 3).

** The file histories of the two Suess applications show 11 prior art references (Px 2B and 2A), and seven additional references were set up by the defendant (Defendant's Substitute Answer, etc.).

The history of the origin and evolution of the patent in suit makes it abundantly plain that there is nothing basic about it.

The patent issued on a continuation-in-part application filed in November 1955 and based on an original application filed in 1951 (Px 2A and 2B). The original application aimed only at the unimportant and unused idea of maintaining a ratio between the bath depth and its surface area (Px 2B, pp. 2, 9-12). No claims of this type were allowed by the Patent Office (Px 2B, pp. 15-16, 20-21, 30-32, 39-40), and other claims aimed at different subject matter then were introduced (Px 2B, pp. 43-45, Px 2A, pp. 31-33), but with no greater success (Px 2B, p. 48, Px 2A, pp. 58-60). Finally, claims of a third type were brought forward (Px 2A, pp. 72-95), and became those now in suit.

That the patent in suit is in no way "basic" is shown not only by its history, but by the earlier claim of VOEST and BOT that their Schwarz patent was basic.* Specifically, they said it represented "a fundamentally new idea", which

> "for the first time points out a method by which, in practical operation, steelmaking iron can be refined by direct reaction with pure oxygen" (Dx 5, pp. 3, 27-28).

The Motion of the Government of Austria is without merit and should be denied.

2. The Brief Attached to the Motion Sets Forth No Valid Reason for the Grant of the Writ of Certiorari.

The Brief attached to the Motion offers nothing new and is simply a reworded edition of the Petition for Certiorari (compare Mot. Br. pp. 10-24, with Pet. pp. 21-28, and Mot. Br. pp. 24-27 with Pet. pp. 29-31).

---

* This was in 1953, three years after the first Suess application was filed in Austria, and two years after the original Suess United States application (App. p. 54a).

It is characterized by the unjustified breadth of its statements, and by the fact that few of its statements make any pretense of being supported by the record.

The facts and the law urged in opposition to the grant of the petition (see Br. in Op. pp. 5-14) have equal application here and need not be repeated. It is sufficient to briefly note several statements of the Brief to which exception must be taken.

1. The Brief inveighs against the decisions below, saying that

> "The result was a mechanical, insensitive, and unjustifiably harsh application of the statute [§ 112]" (Mot. Br. pp. 23-24),

and that

> "The grounds for invalidity were trivial compared with the consequences" (Mot. Br. p. 2).

Again and again the Brief refers to "technical drafting errors" (Mot. Br. p. 3), and to "insignificant and unnecessary technicalities" (Mot. Br. p. 9; see also pp. 4, 5, 16), as though the only fault in the patent in suit was an error in drafting.

This is far from the fact. The District Court noted and excused many errors in the specification of the patent which were more serious than drafting errors (App. pp. 147a-158a). Beyond this, however, the specification abounds in indefinite and indeterminate terms, such as, avoiding "*deep* penetration" (App. p. 208a, col. 3, ll. 46, 74; col. 4, l. 70; p. 211a, col. 9, l. 18), a "*relatively confined* zone" (App. p. 208a, col. 3, ll. 47-48; p. 209a, col. 5, l. 61), and a "*localized* center" (App. p. 208a, col. 4, l. 35), and the steps of the claims, in some cases meaningless, suffer either from having no antecedent in (step 2), or from actual conflict with (steps 1 and 5) the specification (Br. in Op. pp. 6-12).

Literally, it is impossible, by study of the patent, to define its process or determine what is covered by its claims.

And it is for the purpose of guarding against this that Section 112 exists. It is not a new section, but is based on and substantively follows 35 U. S. C. § 33 (1946 Ed.), which, in turn, was based on R. S. § 4888, which goes back to the Act of July 7, 1870 (see Act of July 7, 1870, c. 230, § 26, 16 Stat. 201; amended March 3, 1915, c. 94, § 1, 38 Stat. 958; May 23, 1930, c. 312, § 2, 46 Stat. 376).

Moreover, the broad public purpose which is the heart of Section 112 (and of its predecessor statutes), has many times been referred to by this Court.

Thus, in *Gen. Electric Co.* v. *Wabash Co.*, 304 U. S. 364 (1938), it was said that

> "The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights" (304 U. S. 369).

Again, in *United Carbon Co.* v. *Binney Co.*, 317 U. S. 228 (1942), this Court said that

> "To sustain claims so indefinite as not to give the notice required by the statute would be in direct contravention of the public interest which Congress therein recognized and sought to protect" (317 U. S. 233).

And, in *Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471 (1944), this Court said

> "But the *quid pro quo* [for the grant of the patent] is disclosure of a process or device in sufficient detail to enable one skilled in the art to practice the invention once the period of the monopoly has expired; and the same precision of disclosure is likewise essential to warn the industry concerned of the precise scope of the monopoly asserted . . .
>
> "The claim is required to be specific for the very purpose of protecting the public against extension of the scope of the patent" (322 U. S. 484-485).

So also *Gill* v. *Wells*, 22 Wall. 1, 25-26 (1874); *Halliburton Co.* v. *Walker*, 329 U. S. 1, 10 (1946).

2. The Brief attempts to equate "the avoidance of deep penetration" and "the avoidance of material agitation". In that connection, it criticizes the Court of Appeals for holding (App. p. 30a) that the term "avoidance of material agitation" was "meaningless". The Brief goes on to say that when the patent was applied for (assumedly in 1951, when the first United States application was filed),

> "the term meant something to those skilled in the art, to the patentees, and to the Patent Office" (Mot. Br. p. 12).

The statement, unsupported by any record citation, is contrary to the fact. As has been shown, neither the patentees nor those skilled in the art knew what the "avoidance of material agitation" meant (Br. in Op. pp. 6-7).

With respect to the terms "avoiding deep penetration" and "avoiding material agitation", the Brief states that

> "So far as the patentees were concerned, the phrases were synonymous" (Mot. Br. p. 11).

But there is nothing in this record to show that that is so, and one of the patentees, Dr. Hauttmann, testified that he did not associate agitation with penetration (R. p. 2414), and could not say whether agitation increased and decreased as penetration increased and decreased (R. p. 2418).

The fact is that the term "avoidance of deep penetration" is as meaningless as the "avoidance of material agitation". Illustratively, Petitioners' chief expert, Dr. Chipman, said

> " 'deep' does not always mean the same thing to me. I regard such a word as 'deep' as requiring a further definition" (R. p. 715).

And, on this trial Petitioners' witnesses—all brought forward as experts—said that a penetration ranging from 35% to "90% to 100%" of the bath depth was allowable

within the teaching that "deep penetration" was to be avoided (App. pp. 106a-107a). The District Court could only hold that the term "avoidance of deep penetration" had "no precise meaning" (App. p. 101a).

This is so basically true that it has lent itself to any meaning opportunism suggested.

Thus, when the patentees desired to avoid the prior art they maintained that the avoidance of "deep penetration" meant no penetration at all, but when they wished to bring Respondent's operation within the terms of the patent, they redefined the term as allowing a penetration up to one half the bath depth.

Substantiating this statement, when the applicants, both in the United States and in Germany, were confronted with the prior art Schwarz and Miles patents, they, in the words of the District Court,

> "defined the avoidance of deep penetration as practically no penetration at all in order to distinguish the prior art for purposes of prosecuting their own patent applications" (App. p. 105a).

The Court of Appeals reached the same conclusion (App. p. 27a), and both Courts did this only after a detailed review of the actual representations made by the applicants to the German and American patent offices (App. pp. 103a-105a, 25a-27a).

This litigation made it expedient to redefine the term, since the McLouth operation involved a penetration to or beyond the middle of the bath (R. pp. 10972, 10995, 11017, 6748, 6756, 8778). To take care of this situation, again in the words of the District Court:

> "Dr. Hauttmann testified that the process of the patent in suit involved a penetration of not more than one-half of the bath depth. (R. 2530.) Dr. Trenkler testified that penetration from one-third to one-half of the bath depth would be the maximum penetration under the teachings of the patent in suit. (R. 11,911.)" (App. pp. 106a-107a).

The Court of Appeals, quoting the same testimony, noted that

> "the patentees now seek a broader description of that term [than no penetration] encompassing any penetration of one half the bath depth or less" (App. p. 27a).

3. The Brief makes the unsupported statement

> "As soon as high purity oxygen became available at low cost and in large quantities, many workers tried to use it in various ways to refine iron into steel. None, however, knew how to do it and their efforts failed" (Mot. Br. p. 6).

The facts are to the contrary.

The Miles patent, owned by VOEST-BOT, speaking as of November 1946, said that oxygen

> "has never been applied on a large scale [in steelmaking] due to the relatively high cost of pure oxygen" (App. p. 239a).

Dr. Chipman placed the date of the availability of bulk oxygen in 1947 (R. pp. 9414-9415), and Dr. Trenkler stated that

> "European firms were now [in 1949] also able to produce inexpensive oxygen" (R. pp. 11923-11924).

Others in Petitioners' camp made similar statements (Dx 61, Robiette article, p. 1103; Dx 68, patent No. 2,644,746, col. 1, ll. 1-7 and patent No. 2,829,960, col. 1, ll. 25-28).

While the District Court refused "to fix with certainty" a date for the inexpensive availability of bulk oxygen (App. p. 97a), it did hold that

> "In the 1940's, especially after World War II, pure oxygen apparently became more readily available at low cost, and experimentation with oxygen in steelmaking increased in intensity" (App. p. 51a).

Even more to the point, the Court of Appeals held that

> "Prior to 1950 not a great deal had been done commercially with the use of pure oxygen in the refining process" (App. p. 11a).

And, after high purity oxygen became available, this record contains no evidence of the failure of any "worker" who "tried to use it in various ways to refine iron into steel".

To the contrary, in 1951, Dr. Trenkler wrote the VOEST general manager that

> "Attempts to produce steel *with pure oxygen* in the converter had been made with good success in 1948 at Gerlafingen [by Drs. Durrer and Hellbruegge]" (Dx 31B, p. 3, italics in original).

And, in 1953, VOEST published an article by Dr. Hauttmann admitting that in 1948

> "R. Durrer and H. Hellbruegge had been successful in producing a steel of satisfactory quality by blowing an inclined jet of pure oxygen onto a bath of pig iron in a two-ton tilting vessel" (Dx 15, p. 29).

To the same effect is the VOEST-BOT representation, already noted, that the 1943 Schwarz patent

> "points out a method by which, in practical operation, steelmaking iron can be refined by direct reaction with pure oxygen" (*ante* p. 4).

Conclusion

The Government of Austria fails in its Motion to show a single, valid reason why that Motion should be granted, and the attached Brief—simply another statement of the arguments made in the Petition—emphasizes that the Motion is unfounded and without merit.

The Motion should be denied.

Respectfully submitted,

WILLIAM B. CUDLIP
T. DONALD WADE

DICKINSON, WRIGHT, MCKEAN & CUDLIP
800 First National Building
Detroit, Michigan 48226
Attorneys for Respondent.

JOHN VAUGHAN GRONER
RONALD F. BALL
DONALD E. DEGLING

FISH, RICHARDSON & NEAVE
277 Park Avenue
New York, N. Y. 10017
Of Counsel

February 18, 1969